

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DORIS WIEBERG

Claimant

VS.

SOUTHWEST KENTUCKY FRIED CHICKEN

Respondent

AND

FIDELITY & GUARANTY INSURANCE CO.

Insurance Carrier

Docket No. 1,011,235

ORDER

Respondent requested review of the June 27, 2006 Award by Special Administrative Law Judge (SALJ) Vincent L. Bogart. The Board heard oral argument on October 20, 2006 in Wichita, Kansas.

APPEARANCES

Dale V. Slape, of Wichita, Kansas, appeared for the claimant. P. Kelly Donley, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. In addition, at oral argument the parties agreed to the following:

1. Claimant's date of accident was June 23, 2001;
2. Respondent accommodated claimant's restrictions until April 2003 when she was assigned to another location. At that point, claimant was no longer accommodated and she left respondent's employ; and
3. The functional impairment rendered by Dr. Bruner should be considered in light of the combined values chart as set forth in the 4th edition of the *Guides*¹.

¹ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.). All references are to the 4th ed. of the *Guides* unless otherwise noted.

ISSUES

The SALJ concluded claimant was completely and permanently incapable of engaging in any type of substantial and gainful employment as a result of her June 23, 2001 work-related injury, and granted her permanent total disability benefits under K.S.A. 44-510c(a)(2).

The respondent requests review of this decision. Respondent maintains that claimant's reflex sympathetic dystrophy (RSD) and her resulting permanent impairment is limited to her left lower extremity, and that any other RSD complaints or impairments are attributable to an intervening car accident that occurred in November 2002. Alternatively, if claimant's work-related impairment is to her whole body, then the more persuasive evidence indicates that claimant is capable of sedentary work. Therefore, she is, at most, entitled to a work disability based upon a 33 percent wage loss and a 48 to 71 percent task loss. Additionally, respondent also argues that there is medical and vocational expert testimony that supports an argument that claimant is capable of earning a comparable wage in spite of her work-related injury, and thus her recovery is limited to her functional impairment.

Claimant argues that the Award should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

On July 23, 2001, claimant suffered injury when she walked through some grease on the floor and slipped, injuring her left knee, left hip, left foot and right foot² although initially all of her complaints were limited to her left knee. Claimant notified the respondent of the incident and continued to work another 4 hours, even though her knee was swelling. She also attempted to work between 5-1/2 to 6 hours the next day, and then was sent to minor emergency for medical treatment. Claimant was put on light duty and given crutches and pain medication. Claimant returned to work, but her pain continued so she was sent to Dr. Cusick.

Dr. Cusick provided physical therapy and a steroid injection in the knee. Unfortunately, these methodologies did not provide any relief. Her MRI's and bone scan were both negative. Then, in January 2002, claimant had exploratory arthroscopic surgery to the knee, and was sent to post-operative physical therapy. In mid-February claimant

² R.H. Trans. at 7-8.

returned to work on light duty.³ But her complaints of pain continued, and Dr. Cusick referred claimant to Dr. Bruner for a second opinion.

Dr. Bradley Bruner first saw the claimant on September 23, 2002. His notes indicate claimant complained exclusively of left knee pain. After an examination, during which he observed a limited range of motion, pain with motion and that the left knee was cooler to the touch when compared to the right, he diagnosed claimant with RSD in the left knee which is sometimes referred to as chronic regional pain syndrome. Dr. Bruner described RSD as a condition that results when pain is erroneously processed in the brain and things get crossed up and the pain message is sent down a different nerve path.⁴ He recommended she have a bone scan and suggested she take Neurontin to alleviate her nerve pain. He also recommended she see a pain specialist to address the pain in her leg.⁵

Dr. Bruner saw claimant again on November 7, 2002 and at this visit, she was again complaining of pain in her left knee. In January 2003, Dr. Bruner recommended injections in an effort to alleviate claimant's knee pain. Claimant testified that she told Dr. Bruner she had been involved in a car accident in November 2002, but there is no indication in these records about the extent of her injuries, if any.

Claimant testified that she was "shaken up" in the November 2002 accident and she was left with bruising on her chest and some generalized pain, but she was generally the same after this accident. She specifically denied injuring her right or left arm or her neck. And she returned to work following the accident. However, claimant conceded she never had any neck, left or right arm symptoms before this automobile accident.⁶

After undergoing treatment with a pain management specialist and receiving no measurable benefit, a spinal cord stimulator was recommended. A period of time elapsed before that device was authorized and actually implanted. In the meantime, claimant's RSD complaints began to spread. Sometime in 2003, the right knee began to hurt as well, followed by right arm pain. She also complained of spasms in her fingers and toes, as well as pain in her right hip, shoulder, neck, ribs, back, left elbow and hip. Dr. Bruner continued to treat her with the goal of stopping the nerve pain but unfortunately, he was not successful. She has been on a variety of medications and as of the Regular Hearing,

³ Claimant continued to work for respondent until April 2003. She testified that she worked her normal job duties, standing and sitting as needed, until December 2002. Then she was moved to a different store and was no longer able to self accommodate her needs. Then in April 2003, she voluntarily quit her job.

⁴ Bruner Depo. at 10.

⁵ Some of Dr. Bruner's records indicate that he was focused on the condition of claimant's *right* knee, but at his deposition he indicated this was a typographical error and that his initial focus was always on her left knee.

⁶ R.H. Trans. at 22-24.

taking Synthroid, Atenolol, Maxzide, potassium, Baclofen, Catapres TTS patches, Bextra, Zolof, Morphine, Fentanyl, Percocet, Zanaflex and various allergy medications.

Since she was diagnosed with RSD, claimant testified she has had difficulty with the constant pain, and has trouble coping being around people as she gets emotional and suffers from anxiety attacks. She also has difficulty in crowds and around loud noises. Claimant testified the spinal cord stimulator provides her with some relief, but when it is turned off, she has trouble walking and the pain is stronger.

When asked to describe claimant's current condition, Dr. Bruner responded as follows:

A. She's got involvement of both legs to a severe degree, the arm to a moderate severe degree, she requires daily medication, she has trouble with muscle spasms, difficulty with being in one position too long, meaning any more than 15 minutes or so, she can't sit too long, stand too long, walking. She has trouble with concentration, either secondary to the pain syndrome itself, the pain involved with the pain syndrome or the medication it takes to get relief from it.

Q. Is that part of it?

A. Yes. I mean I believe she's disabled from it all.

Q. Does she have, as far as her ability to not only concentrate, but to simply deal with people in a professional fashion if she is out in the world, or to attempt to work, is she going to have problems with her attitude, temperament or maintaining a professional attitude?

A. I think so.

Q. Is that part of the disease as well? Or the medication or a combination?

A. It is part of the disease or the treatment. And unfortunately it doesn't matter which. This has been going on for so long she's past the final stages of assuming we are going to improve from this. So it is going to be a life time deal.

Q. Physically how? She's given us a typical day, doctor, so you know where she's coming from and what she has told us, she's only able to function for a couple hours at a time and then requires rest and then she tries to stay up and remain active. Is that testimony consistent with your opinion?

A. Yes. But unfortunately everybody is different with this. Some people need to stay a little bit active, but they can't do too much at a time. In her case she basically rests and it calms down a little. And then she tries to do a few things and tries to function like that.

Q. And it flares?

A. Yes, it does.⁷

Dr. Bruner ultimately found claimant to be at maximum medical improvement on March 24, 2005, and concluded she is not going to get better and that she is not employable.⁸

Q. Doctor, given her current condition, including, within this opinion I also want you to include any pain or discomfort that she is in, as well as her current abilities and the medications, of course, do you have an opinion to a reasonable medical probability as to whether or not this lady is essentially and realistically employable?

A. She's not employable. And she never will be.

Q. In other words, she's, in your opinion, not capable of engaging in substantial gainful employment; is that correct?

A. I don't believe she is, due to all the factors we have discussed.

Q. And are those opinions expressed to a reasonable medical probability?

A. Yes, they are.⁹

When asked about the cause of her current condition, he testified that her RSD complaints were caused by either her initial injury or the surgery to her left knee, or "a bit of both".¹⁰ Dr. Bruner conceded that as of November 2002 claimant's only complaints were to her left knee/leg, and that after her car accident the RSD complaints began to spread. He also testified that it is "possible" that the car wreck caused the RSD to manifest itself elsewhere in her body and that a "very minor trauma" to an individual who already has RSD could start the RSD process in other parts of her body.¹¹ But according to Dr. Bruner, he believed she only struck her right knee in the automobile accident.¹² And based upon the timing of the complaints, he believed the RSD complaints in the lower extremities were caused by the initial fall. Thus, he did not attribute any of claimant's problems to her right lower extremity or her upper extremities to the automobile accident. He went on to testify that whether one extremity or 3 are involved, it was his opinion that claimant would require

⁷ Bruner Depo. at 17-19.

⁸ *Id.* at 21.

⁹ *Id.* at 20-21.

¹⁰ *Id.* at 9.

¹¹ *Id.* at 24-25.

¹² *Id.* at 22. It is unclear from his testimony if he is confused about whether claimant struck her left or right knee in this automobile accident. His records and his testimony are inconsistent with one another.

the same medications she is presently being prescribed and she would still be unable to work.¹³

Dr. Bruner assigned a 30 percent permanent partial impairment to the whole body as a result of claimant's RSD. Unfortunately, this 30 percent reflects an inaccurate combined value. The parties concede Dr. Bruner's impairment ratings were 10 percent to the whole body for each of the lower extremities and one upper extremity. They further agree that, pursuant to the *Guides*, this rating when properly combined yields a 27 percent whole body permanent partial impairment.

At respondent's request, claimant saw Dr. Paul Stein on November 7, 2003 for an evaluation. At the time of this examination, claimant's chief complaint was widespread pain from a knee injury. Dr. Stein testified the claimant told him that her pain started in her left knee and spread to her left leg and foot, and then into the right side to then include claimant's entire lower body. Upon examination, Dr. Stein diagnosed complex regional pain disorder, and recommended that the claimant get a temporary spinal stimulator, with a permanent one to follow if the results are satisfactory.

In January 2006, Dr. Stein saw claimant again and had an opportunity review the records generated since his last examination of the claimant. According to his testimony, claimant reported ongoing pain in her left and right lower extremities, right upper extremity, up her mid back, around the rib cage on both sides and into her neck. Claimant was using a cane to walk, but was only able to go short distances.

Following this examination, he found himself "perplexed" about the spread of pain.¹⁴ He indicated that the findings in the right upper and lower extremity were minimal if any, and that the findings on the left lower extremity were less than those present during his November 7, 2003 evaluation. He felt that claimant should have shown some improvement, but instead was worse. He recommended that the claimant have a psychological evaluation before he made any further treatment recommendations.¹⁵ When asked to explain his position, he responded as follows:

... With complex regional pain disorder, the reason it's called regional pain disorder is that it's usually in one region. It can spread and it can affect another extremity. To affect the entire body in this manner leaving only the left arm unaffected, particularly in a patient where the original complex regional pain disorder in the left leg was not severe-- she didn't have severe trophic changes-- I felt that she did have enough evidence to make the diagnosis, but it wasn't a severe case. I couldn't understand it. There were no real findings to explain all of these other extremities,

¹³ *Id.* at 36.

¹⁴ Stein Depo. at 9.

¹⁵ *Id.*, Ex. 4 at 3 (Jan. 31, 2006 IME).

and so I simply put down that I do feel she has a complex regional pain disorder of the left lower extremity. I think that diagnosis is correct. I can't really explain the other pains that she's having at this time.¹⁶

Based on his examination findings, Dr. Stein offered the following restrictions: "permanently avoid standing or walking more than 20 minutes at a time or more than a total of one hour in an eight-hour workday."¹⁷ He also recommended sedentary work and to avoid sitting for long periods, to stand and stretch intermittently, and to avoid operating dangerous equipment.¹⁸ Dr. Stein further opined that the claimant's condition was permanent, and that he really could not anticipate if the claimant's condition would change in the future given the fact that she has already had considerable changes over the last few years.¹⁹ And based on the report of Dan Zumalt, he testified the claimant lost the ability to perform 43 out of 61 tasks for a task loss of 71 percent. He concluded that if she could find a job within her restrictions, then she was employable.

Dr. Stein acknowledged that claimant's ability concentrate depends on the amount of pain she's experiencing. She would also have difficulty serving the public continuously and remaining professional. He further offered the following:

I'm not an expert on employment or what jobs are available out of the work force. If she can find work, or if there's work available within the restrictions that I provided, I believe that she should be able to be employed.²⁰

At respondent's request, Dr. Phillip Mills saw the claimant on June 9, 2004 for evaluation. At the time of this visit the claimant had diffuse full body pain in the knees, hips, feet, back, upper extremities, neck, and shoulder. The claimant described the pain as burning and throbbing with numbness and tingling in the left knee, right hand, arm and shoulder. Claimant told Dr. Mills that the pain was aggravated by simple housework, walking, standing, sitting or lifting, and was relieved by relaxing or soaking in a tub. Claimant stated that her pain was a constant 9 out of 10. Dr. Mills noted that the claimant had problems standing and lifting.²¹

Dr. Mills diagnosed the claimant with chronic pain syndrome. He felt that there was a causal relationship between claimant's knee pain and her reported injury. He found her

¹⁶ *Id.* at 9.

¹⁷ *Id.* at 10.

¹⁸ *Id.* at 11.

¹⁹ *Id.* at 11.

²⁰ *Id.* 14-15.

²¹ Mills Depo., Ex. 2 at 2.

to be at maximum medical improvement and assigned a 25 percent permanent partial impairment to the whole body. Following his initial evaluation, he indicated she was unable to work. Thereafter however, Dr. Mills had the opportunity to review additional medical records. At his deposition Dr. Mills testified he thought claimant was capable of working at a sedentary level, albeit with restrictions, *provided* she was weaned off the narcotic medications she was taking.²² And that based upon Mr. Zumalt's task list, claimant had lost the ability to perform 29 of 61 tasks, which is a 48 percent task loss.²³

Claimant was seen by Jerry Hardin and Karen Terrill for a vocational assessment and was determined by these individuals to be permanently and totally disabled based on the opinions expressed by Dr. Bruner. Conversely, Mr. Zumalt testified that claimant could earn up to \$12 per hour as a telemarketer or \$10 per hour as a switch board operator.

The SALJ concluded that claimant was permanently and totally disabled pursuant to K.S.A. 44-510c(a)(2). In making this finding, the SALJ offered the following observations:

[Dr.] Stein seemed rather uncertain as to the long term effects of her injury if he were to consider only objective evidence and excluding effects of her medicine - but he was of the opinion, that based on all of the existing conditions including medications, it would be questionable whether she could ever be employable.²⁴

The SALJ also noted that Dr. Mills, who thought claimant *could* work if she was weaned from her medications, had not seen claimant since June 9, 2004. He then concluded that "[i]nasmuch as the medications are an integral part of the ongoing treatment of claimant and the lack of any recent exam by Dr. Mills, the court fees the testimony of Dr. Bruner to be of a more definitive nature."²⁵ The SALJ made no conclusions or reference to the intervening automobile accident in the Award.

K.S.A. 44-510c(a)(2) defines permanent total disability as follows:

Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis or incurable imbecility or insanity, resulting from injury independent of all other

²² *Id.* at 20.

²³ *Id.* at 22-23.

²⁴ ALJ Award (June 27, 2006) at 3.

²⁵ *Id.*

causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

While the injury suffered by the claimant was not an injury that raised a statutory presumption of permanent total disability under K.S.A. 44-510c(a)(2), the statute provides that in all other cases permanent total disability shall be determined in accordance with the facts. The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.²⁶

In *Wardlow*,²⁷ the claimant, an ex-truck driver, was physically impaired and lacked transferrable job skills making him essentially unemployable as he was capable of performing only part-time sedentary work.

The Court, in *Wardlow*, looked at all the circumstances surrounding his condition including the serious and permanent nature of the injuries, the extremely limited physical chores he could perform, his lack of training, his being in constant pain and the necessity of constantly changing body positions as being pertinent to the decision whether the claimant was permanently totally disabled.

Claimant maintains that like the injured employee in *Wardlow*, she is permanently and totally disabled as a result of her work-related injury. Claimant is on a significant number of medications, all as a result of her injury, and is unable to sustain any physical activity for any significant length of time. She is a high school graduate who has minimal transferrable skills. Her work history is limited to personal care or manual labor jobs and fast food positions, with some supervision responsibilities. Claimant further relies upon the testimony of Dr. Bruner, the physician who has been treating her since she first suffered injury.

Respondent maintains claimant's impairment attributable to her work-related injury is limited to her left knee and that any other complaints or conditions she may have are causally related to her November 2002 automobile accident.

The Board has considered the parties' arguments and concludes the SALJ's Award should be affirmed. It is uncontroverted amongst the physicians who testified that claimant suffers from RSD or regional pain syndrome in her left knee/leg. That condition was well established by the time she was involved in the automobile accident in November 2002. Unfortunately, the facts and circumstances surrounding the November 2002 are largely unexplored. Dr. Bruner was the only physician to be questioned about this intervening event and its potential effect upon claimant. And he did not have the emergency room reports, any related medical reports or even an accident report. He only had claimant's

²⁶ *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

²⁷ *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

recitation of the fact of the accident. Dr. Bruner made it clear that it was his view that although claimant's symptoms were limited to her left knee before her accident, her subsequent right knee and right arm complaints, and even those involving her neck and her rib cage were caused by RSD and attributable to her work-related accident. He did not believe that the November 2002 accident caused the onset of her RSD complaints in those other body parts. More importantly no physician testified that the November 2002 accident was the cause of claimant's RSD complaints. For these reasons, the Board affirms the SALJ's conclusion that claimant is permanently and totally disabled.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Special Administrative Law Judge Vincent L. Bogart dated June 27, 2006, is affirmed in all respects.

The record does not contain a filed fee agreement between claimant and his/her attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, he/she must file and submit his/her written contract with claimant to the ALJ for approval.

IT IS SO ORDERED.

Dated this _____ day of November, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned Board Member respectfully dissents from the majority opinion in the above Order. The majority found claimant's RSD to be a natural consequence of

claimant's accident on July 23, 2001. However, the RSD symptoms were limited to claimant's left lower extremity until claimant was involved in a non-work-related automobile accident in November, 2002. After the auto accident, the claimant's RSD spread to multiple parts of claimant's body.

In workers compensation litigation, it is the claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence.²⁸

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.²⁹

In workers' compensation litigation, when a primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from that injury, including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.³⁰

This Board Member acknowledges that claimant suffered a work related accident and developed problems including left lower extremity RSD as a result. However, where the worsening or new injury would have occurred even absent the primary injury or where it is shown to have been produced by an intervening cause, it would not be compensable.³¹

The Kansas Supreme Court, in *Stockman*,³² stated:

The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In *Stockman*, the claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

²⁸ K.S.A. 44-501 and K.S.A. 44-508(g)

²⁹ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

³⁰ *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

³¹ *Nance v. Harvey County*, 263 Kan. 542, 952 P.2d 411 (1997).

³² *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 505 P. 2d 697 (1973); see also *Nance v. Harvey County*, 263 Kan. 542, 952 P.2d 411 (1997).

The evidence in this matter supports a finding that claimant suffered a scheduled injury to her left lower extremity including the initial RSD complaints for which she should be compensated. The undersigned Board Member would find the remainder of claimant's physical complaints and the development of RSD in the rest of her body resulted from the November 2002 automobile accident. The undersigned Board Member would limit claimant's award to a scheduled injury award under K.S.A. 44-510d.

BOARD MEMBER

c: Dale V. Slape, Attorney for Claimant
P. Kelly Donley, Attorney for Respondent and its Insurance Carrier
Vincent L. Bogart, Special Administrative Law Judge
Thomas Klein, Administrative Law Judge